Supreme Court of the United States

OCTOBER TERM, 1920.
No. 317.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Copartners, trading under the firm name of GIOVANNI LUZZATO & SON,

Appellants,

against

THE STEAMSHIP *PESARO*,

Appellee

BRIEF FOR APPELLEE.

JOHN M. WOOLSEY,
Counsel.

SYNOPSIS OF POINTS

FIRST POINT.

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MISCELLANEOUS.

UNITED STATES SUPREME COURT.

GIOVANNI LUZZATO and JOSEPH G. LUZZATO, Copartners, Trading Under the Firm Name of GIOVANNI LUZZATO & SON, Appellants, vs. THE STEAMSHIP PESARO, Appellee.	OCTOBER TERM, 1920 No. 317

BRIEF FOR APPELLEE.

This case comes to this Court by direct appeal from the United States District Court for the Southern District of New York on a certificate of an alleged question of jurisdiction, purporting to be in pursuance to Section 238 of the Judicial Code, granted by the Honorable John C. Knox, United States District Judge. Folios 36 to 38.

The propriety of this direct appeal in a case, in which as here, a question only of immunity is involved, is challenged by the appellee on a motion to dismiss or affirm returnable on the argument.

The decision below, which was in memorandum form, was not reported.

The Facts.

The libel, filed January 5, 1920, was brought for alleged damage to 290 cases of olive oil shipped on board the *Pesaro* on August 30, 1919, at Genoa, Italy, and delivered in an alleged damaged condition in New York on September 17, 1919. The libelants, claiming through certain mesne assignments of the bills of lading, contend that their damage amounted to $4,800. Folios 1-3.

A monition issued in the usual course to the United States Marshal for the Southern District of New York and the vessel was arrested thereunder by him on January 19, 1920. Folios 6-7, 9.

On January 20, 1920, a special appearance and suggestion by Baron Avezzana, Ambassador of the Kingdom of Italy to the United States, under the seal of the Embassy, was filed in the District Court:

> "Baron Camillo Romano Avezzana, Ambassador of the Kingdom of Italy to the United States of America, through Kirlin, Woolsey & Hickox, proctors appearing specially for the Italian steamship *Pesaro,* for the purpose of claiming immunity and for no other purpose, respectfully suggests to the District Court of the United States for the Southern District of New York, that said steamship *Pesaro* at all the times mentioned in the libel and complaint of Giovanni Luzzato and Joseph G. Luzzato, co-partners doing business under the firm name and style of Giovanni Luzzato & Son, against the steamship *Pesaro* was, since has been, and now is, owned by the Government of the Kingdom of Italy, and is now in the possession of the Government of the Kingdom of

Italy, in the person of a master employed and paid by said Government, and is wholly manned and operated by a master, officers, engineers and crew employed and paid by said Government.

Wherefore, it is respectfully suggested and prayed that said steamship be released from any seizure made and declared immune from the process of this Court.

Done at the Embassy of the Kingdom of Italy. Washington, D. C., January fifteenth, 1920.

[SEAL] ROMANO AVEZZANA."

Folio 11.

This suggestion was accompanied by a certificate, dated January 16, 1920, from the Secretary of State, reading as follows:

"UNITED STATES OF AMERICA,

Department of State:

To all to whom these presents shall come, Greeting:

I certify that Baron Camillo Romano Avezzana whose name is subscribed to the paper hereto annexed, is duly accredited to this Government as Envoy Extraordinary and Minister Plenipotentiary of Italy.

In testimony whereof I, Robert Lansing, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name subscribed by the Chief Clerk of the said Department at the City of Washington, this 16th day of January, 1920." Folio 10.

On January 20, 1920, after a hearing Judge Knox made a memorandum order vacating the attachment. This order read as follows:

> "Upon the suggestion of the Italian Ambassador filed herein to the effect that the S. S. *Pesaro* is owned by the Italian Government and now in its possession and manned by a crew of said Government, I vacate the attachment herein, conceiving myself so bound to do under the authority of the *Carlo Poma* decided by the Circuit Court of Appeals for this Circuit." Folio 12.

In pursuance of this order and on January 20, 1920, the United States Marshal for the Southern District of New York discharged the *Pesaro* from his custody. Fol. 7.

On January 21, 1920, after the discharge of the vessel as above noted, a petition was filed by the proctors for the libelants in which they sought to traverse the suggestion of the Italian Ambassador. Folios 13-17.

On January 23, 1920, Judge Knox made and filed a formal order in the case. *He did not dismiss the libel but merely released the vessel.* His order contained recitals of what had happened in the case and reaffirmed his memorandum order, above set forth, and released the steamship *Pesaro* from seizure, declaring her immune so long as she is under the ownership and possession of the Government of the Kingdom of Italy. Folios 24-26.

At the same time Judge Knox made the following endorsement on the said order:

> "I consider that the relief prayed for in the petition of the libellant should be denied upon the ground that I hold the allegations therein or facts which may be offered in support thereof are not admissible to controvert or question the veracity

of the suggestion of the Italian Ambassador." Folio. 27.

Thereupon an appeal, with assignment of errors, was taken from the United States District Court direct to this Court. Folios 28-33.

The appeal was allowed by Judge Knox, and on April 3, 1920, he signed a certificate stating that a question of jurisdiction was involved. Folios 34-37.

A motion was made thereafter by counsel appearing specially for the Italian Ambassador to strike out the petition and traverse sought to be made by the libelants, together with the annexed affidavits. Folios 41-42.

This motion was denied by Judge Knox on grounds stated in a memorandum opinion of April 24, 1920, as follows:

> "Over the protest of the libellant I vacated the attachment and arrest originally issued herein. At the time of the hearing there was urged upon me as a reason for refusing to act as I did, the state of facts presented by the petition filed herein upon January 21, 1920. This petition formally presenting what was before me somewhat more informally I am asked to strike from the record.
>
> "My action in releasing the *Pesaro* from arrest is now under review, and I am unable to see why the reviewing authority should not be apprised of all the facts that appeared before me and which were considered in reaching my conclusion. Only by so doing, it seems to me, can the nature and extent of error, if any, be properly seen and corrected. The motion to strike out the petition is denied." Folio 45.

FIRST POINT.

THIS COURT HAS NOT JURISDICTION ON THIS APPEAL BECAUSE IT WAS IMPROPERLY TAKEN TO THIS COURT DIRECT. THE QUESTION OF THE JURISDICTION OF THE DISTRICT COURT *as a Federal Court* WAS NOT INVOLVED AND, HENCE, THE APPEAL SHOULD HAVE BEEN TAKEN TO THE CIRCUIT COURT OF APPEALS AS WAS DONE IN "THE CARLO POMA," No. 167 ON THE PRESENT CALENDAR OF THIS COURT.

The appellee has made a motion, returnable at the time of this argument, to dismiss the appeal or affirm the judgment below on the ground that the appeal was improperly taken directly to this Court, for the reason that a question of immunity is not a question of jurisdiction within the meaning of Section 238 of the Judicial Code.

The relevant portion of Section 238 of the Judicial Code under which this appeal was taken to this Court is as follows (italics ours):

> "Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: *In any case in which the jurisdiction of the Court is in issue*, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision; * * *"

It has always been held under that section of the Judicial Code and similar earlier statutes that the ques-

tion of jurisdiction, which has to be involved to enable an appeal to be taken to this Court direct from the District Court, is a question of the jurisdiction of the District Court *as a Federal Court.*

There have been decisions to this effect in this Court almost every year since the Circuit Courts of Appeals were established. From *Carey* v. *Houston, T. & C. Ry. Co.*, 150 U. S. 170 (1893) to *Farrugia* v. *Philadelphia & Reading Ry. Co.*, 233 U. S. 352 (1914) such decisions are numerous. The latest we believe to be *De Rees* v. *Costaguta*, decided December 6, 1920, and not yet officially reported.

A question of immunity is not a question of the jurisdiction of the Federal Court *as a Federal Court*, but is either a question of the general jurisdiction and authority of the Court as a judicial tribunal—a kind of question not appealable direct to this Court—

Bien v. *Robinson*, 208 U. S. 423 (1908).
Scully v. *Bird*, 209 U. S. 481 (1908).

or else it is a question of liability—

Workman v. *The Mayor*, 179 U. S. 570, 572, 574 (1900).
The Attualita, 238 Fed. 909, 911 (1916).

which would make it appealable at least in Admiralty cases, to the Circuit Courts of Appeal only.

The case of *The Attualita*, 238 Fed. 909, is the only case, so far as we are aware, in which this precise question has been adjudicated. In that case the question of

the immunity of an Italian privately owned vessel, requisitioned by the Italian Government, came up in the United States District Court for the Eastern District of Virginia, and from an order releasing the vessel on the ground of immunity, appeal was taken to the United States Circuit Court of Appeals for the Fourth Circuit.

Objection was there taken on the part of the appellees that the appeal should have been taken direct to this Court on the ground that the question was a question of jurisdiction.

The Court of Appeals for the Fourth Circuit held that the appeal was properly taken to that Court and said, 238 Fed. at page 911 (Italics ours):

> "The steamship says that the question involved is one of jurisdiction. The appeal should therefore have been taken to the Supreme Court. The objection which prevailed in the Court below was not to the jurisdiction of the District Court of the United States as a Federal Court, but was an objection *which went equally to the jurisdiction of any Court, State or Federal*, and for that reason the appeal to this Court was properly taken."

The situation in the *Pesaro* case now before the Court is simply this:

There is not any doubt whatever that a Court of Admiralty of the United States has jurisdiction of a libel *in rem* for damage to cargo.

If the District Court had really been dealing with question of a jurisdiction, which it thought it did not have, the proper procedure would have been for it to dismiss the libel for want of jurisdiction.

That was not done here.

Here the order merely vacates the arrest and releases the *Pesaro*, declaring her immune so long as she remains under the ownership and possession of the Kingdom of Italy.

As a matter of fact, therefore, the District Court, in this case, retained jurisdiction of the case, and released the vessel because, owing to the doctrine of immunity, it could not hold her liable in a case of which the subject matter was notoriously within its jurisdiction.

The only question involved here, was and is, whether, owing to the fact that the vessel was owned by and in possession of a foreign sovereign, a Court of Admiralty could hold the vessel liable *in rem* for cargo damage.

Such a question does not involve a question of jurisdiction of the Court below as a Federal Court any more than the question of the existence of a maritime lien does.

> Cf. *The Resolute*, 168 U. S. 437, 442, and cases there cited.

It is submitted, therefore, that this appeal was improperly taken direct to this Court and that the motion to dismiss should be granted or the order appealed from affirmed.

SECOND POINT.

THE STEAMSHIP "PESARO" WAS AND IS IMMUNE FROM THE PROCESS OF OUR COURTS AND THE FACT OF HER IMMUNITY WAS PROPERLY PRESENTED TO THE COURT BELOW.

I. *The special appearance of the Italian Ambassador, through proctors, for the purpose of claiming immunity and for no other purpose was a proper procedure for him to follow in the vindication of his Sovereign's prerogatives when a vessel owned by that sovereign was arrested by process of our Courts.*

The practice followed here does not differ from the ordinary admiralty practice except that the appearance was special only to claim immunity instead of being general with intention to dispute the merits of the libel.

When a vessel is arrested *in rem* in an ordinary suit between private litigants, an appearance, which is called a claim, is made by the owner himself, or by the owner acting through an agent, or by the master as lawful bailee of the vessel representing its owner.

The ordinary claim, after reciting the ownership of the vessel and that the owner, or his agent is the lawful bailee thereof, ends with the expression "Wherefore he [or they] pray to defend accordingly."

In the present case, of course, the Italian Government was asserting immunity and the special appearance and suggestion of the Italian Ambassador, representing the owner of the vessel, the Kingdom of Italy, instead of asking for leave to defend as in ordinary

cases, has the following prayer: "Wherefore it is respectfully suggested and prayed that said steamship be released from any seizure made and declared immune from the process of this Court." Fol. 11.

Annexed to the special appearance and suggestion was a certificate by the Secretary of State to the effect that the Italian Ambassador, whose name was subscribed to the suggestion,

> "is duly accredited to this Government as Envoy Extraordinary and Minister Plenipotentiary of Italy." Fol. 10.

The regularity of this procedure for intervention is perfectly clear from the remarks of Mr. Justice Story in the case of *The Anne*, 3 Wheat, 435, 445.

In that case an appeal was taken to this Court from the District of Maryland under the following circumstances:

The British ship *Anne* was captured by a privateer while lying at anchor off the Spanish part of the Island of Santo Domingo in March, 1815, and carried into New York for adjudication as prize. The ship was then removed to Maryland under the provision of an Act of Congress, and Prize Proceedings instituted against her there.

A claim was interposed by the Spanish Consul for restitution of the vessel on the ground that it had been captured within Spanish territorial waters and, hence, in violation of Spain's neutrality.

Both the District Court and the Circuit Court ordered the condemnation of the vessel.

In affirming the decisions below, Mr. Justice Story dealt with the question of the intervention of the Spanish Consul and outlined the method by which diplomatic representatives of foreign States could intervene in our Courts. He said, at page 445 (Italics ours):

> "And this brings us to the second question in the cause; and that is, whether it was competent for the Spanish Consul, merely by virtue of his office, and without the special authority of his government, to interpose a claim in this case for the assertion of the violated rights of his sovereign. We are of opinion that this office confers on him no such legal competency. A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; *but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives.* There is no doubt, that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it. There is no suggestion or proof, of any such delegation of special authority in this case, and, therefore, we consider this claim as asserted by an incompetent person, and on that ground it ought to be dismissed. *It is admitted, that a claim by a public minister, or in his absence, by a chargé d'affaires in behalf of his sovereign, would be good.* But in making this admission, it is not to

> be understood that it can be made in a court of justice without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which this court expressly reserves their opinion, until the point shall come directly in judgment."

So far as counsel has been able to determine, there has not been any case in this Court since the case of *The Anne*, 3 Wheat, 435, where the question of the appearance of an Ambassador or Minister or Chargé d'affaires, on behalf of his sovereign in our Courts has come up. There have, however, been many cases in the lower Federal Courts where such intervention has been allowed and the immunity of the vessels in question sustained.

There is no question but that our Courts are open to suit by a friendly foreign sovereign as a plaintiff.

French Republic v. *Inland Navigation Co.*, 263 Fed. 410.
The Sapphire, 11 Wall. 174.
The King of Prussia v. *Keupper*, 22 Mo. 550.
Beers v. *Arkansas*, 20 How. 527.
Nicoll v. *U. S.*, 74 U. S. 122.
The Siren, 74 U. S. 152.

On the other hand, a friendly foreign sovereign cannot be sued in our Courts and its property is not subject to the process of our Courts.

Kingdom of Roumania v. *Guaranty Trust Co.*, 250 Fed. 341.
The Exchange, 7 Cranch. 116.

Hassard v. *United States of Mexico*, 29 Misc. 511; affirmed 173 N. Y. 645.

Even an enemy alien is entitled to defend if suit is brought against his property *in rem* or jurisdiction is secured over him *in personam*.

Watts, Watts, etc. v. *Unione Austriaca, etc.*, 248 U. S. 9.
McVeagh v. *United States*, 11 Wall. 259, 269.
Windsor v. *McVeagh*, 93 U. S. 274.
Hovey v. *Elliott*, 167 U. S. 409.
The Kaiser Wilhelm II, 246 Fed. 786.

As this is the settled law, how can it be contended with propriety that a friendly Foreign Sovereign has not *a right*, through his duly accredited Ambassador, to go into our Courts and appear specially to claim his own property and ask for the immunity which under international law is due to him and to it?

In the statement from *The Anne*, 3 Wheat. 435, 445, above quoted, Mr. Justice Story recognizes this right and the suggestion is made that the appearance in our Courts should not be without the assent or sanction of our Government. *It is noteworthy that he does not say appearance has to be made through our Executive Departments.*

This precise question, apparently, has never been presented to the Court, but it is here confidently contended that express assent is not necessary because the Courts are open to a foreign sovereign and it would be in derogation of his dignity to have to go to an executive or administrative official of our Government to get *permission* to defend his property.

It is submitted that an appearance by counsel, who is a member in good standing of the bar of the Court, on instructions by an Ambassador is a proper method to be followed in making such an intervention and that *the rule really is that a friendly Foreign Sovereign can always appear in our Courts* without challenge unless our Executive intervenes to object in the Court in which the appearance is sought, in which case, of course, it would be for the Court to decide whether the appearance should be allowed or not.

In the present case, however, the assent of the State Department has been secured because the Ambassador presented to the State Department his special appearance which contained the reasons for his intervention and a statement of the relief sought, and the State Department annexed to his special appearance a certificate of his standing as accredited Ambassador.

In the case of *United States* v. *Benner*, Baldw. 234, a motion in arrest of judgment, after defendant had been convicted of the crime of arresting and imprisoning one Louis Brandis, a minister of the King of Denmark, was overruled.

Mr. Justice Baldwin, in charging the jury, said:

> "By the constitution of the United States, the power of receiving ambassadors and other public ministers, is vested in the president of the United States; this power is plenary and supreme, with which no other department of the government can interfere, and when exercised by the president, carries with it all the sanction which the constitution can give to an act done by its authority. In

the reception of ambassadors and ministers, the president is the government, he judges of the mode of reception, and by the act of reception, the person so received, becomes at once clothed with all the immunities which the law of nations and the United States, attach to the diplomatic character.

"The evidence of the reception of Mr. Brandis in this character, is the certificate from the secretary of the state which has been read. By the law organizing the department of state, it is the special duty of this officer, to perform all such duties as shall be entrusted to him by the president, to conduct the business of the department in such manner as he shall order and instruct, also to take an oath for the faithful performance of his duties. He is denominated in the law, 'the Secretary of foreign affairs'; his appropriated duties are, correspondence and communication with foreign ministers under the orders of the president; he has the custody of all the papers and archives of the department in relation to the concerns of the United States with foreign nations. Whatever act then is done by the department must be taken to be done by the orders or instructions of the president; the certificate of the secretary under the seal, oath, and responsibility of office, must also be taken as full evidence of the act certified. The president acts in that department through the secretary, the one directs, the other performs the duties assigned; the law makes that department with all its officers, the agent of the executive branch of the government, so that a certificate under its seal by the secretary is full evidence, that what has been done by the department has been done by it in that capacity. If the law imposed on that department any duties upon subjects over which the president had no control, or none ex-

clusive of the other branches of the government, a certificate from its chief officer would not be evidence that it was done by the president; but as it can act on no subject unless under his orders, its acts must be taken to be his, especially as to the reception of ministers, as to which congress has no power to enjoin any duties on the department, or its officers.

"You will therefore consider Mr. Brandis as having been recognized by the president in the character of an attache to the legation of Denmark in the United States; and that such recognition is, per se, an authorization and reception of him within the meaning of the act of congress for we cannot presume, that the president would recognize a minister without receiving him. In the case of *U. S.* v. *Liddle* [case No. 15598] it was held by this court, that a certificate from the secretary of state, that a charge d'affaires of Spain had introduced a person to the president as an attache and secretary to that legation, was evidence of his reception as such. *U. S.* v. *Liddle* [*supra*]; U. S. *v.* Ortega [case No. 15,971]. Such recognition invests him with the immunities of a minister, in whatever form it may be done, and no court or jury can require any other evidence of a reception; we instruct you then as a matter of law, that at the times of the alleged arrest Mr. Brandis was a minister of Denmark in the character stated in the certificate."

To the same effect are the opinions of Mr. Justice Washington in *United States* v. *Liddle*, 2 Wash. C. C. 205, and *United States* v. *Ortega*, 4 Wash. C. C. 531.

The State Department certificate given in this case is, it is submitted, an *express assent* and sanction by the State Department to the Ambassador's intervention, if any such be needed. If it is not deemed an express assent, at least it necessarily *imports assent* and follows the strictest construction of the practice in these cases which can be spelled out of Mr. Justice Story's dictum in *The Anne*.

The State Department has not opposed in Court the use of this document with its certificate annexed.

It is clear, therefore, that by every principle of international law and under all the authorities *an Ambassador has a right, representing his sovereign, to vindicate that sovereign's prerogatives in our Courts*, and that in the present instance the course followed by the Italian Ambassador was strictly regular in every respect.

II. *If the Ambassador's appearance be considered an appearance as amicus curiae it was in all respects proper for the Court to allow it, for each Court has an inherent right in the exercise of its judicial discretion to allow appearances before it of amici curiae.*

The inherent right and power of a Court to permit intervention by an *amicus curiae* and to decide to what extent it will hear him and give him credence has been established by long usage.

This right is a part of a Court's essential nature as a tribunal which seeks from whatever proper source such information may be procurable, the information necessary to assist it in administering the law.

This right has perhaps been nowhere more pointedly expounded than by Judge Hough *arguendo* during the trial of the case of *The Texas Company* vs. *Hogarth Shipping Co., Ltd.*, as owner of the British steamship *Baron Ogilvy*, which is No. 555 on the present calendar of this Court, and is to be argued directly after the instant case.

In that case counsel for the British Embassy were allowed to intervene as *amici curiae* to file a suggestion and a certificate of the British Ambassador that the requisitioning of the steamship *Baron Ogilvy* under the circumstances stated in the certificate was a governmental act of the British Government.

The libelant's counsel objected to the intervention and the following colloquy took place:

> "The Court: Well, I think that is my business, and not yours. If I, or the Court, chooses to listen to the first man that comes in off the street, what right have you to object?
>
> Mr. Poor: Well, it seems to us that it seriously——
>
> The Court: Litigants do not own the Court. The Court is here for the purpose of listening to anybody and everybody, that it may contribute to the proper administration of what we are pleased to call justice.
>
> Mr. Poor: Well, it is perfectly well established in diplomatic practice that if the Ambassador wishes to deal with any governmental power or official he has to make his suggestion through the State Department, and if the Ambassador wishes to take up any question with any government of-

ficial it is the correct thing for him to submit what he wishes to say to the State Department, and have the State Department, if it considers it proper, then to carry it on to the party whom the Ambassador wishes to reach. It seems to me that it is just as improper for a foreign Ambassador to directly attempt to intervene in a case before a Court, without the sanction of the Secretary of State, as it is to deal with any other department of the government, whether that department is——

The Court: I greatly resent that. I do not agree with you at all on that suggestion. It may be that the British Ambassador, if he chooses to come into a Court of the United States, or any other sovereignty, and make representations, may be violating diplomatic custom; but that this Court in any way, shape or manner depends upon any branch of the executive department of the Government of the United States, and more especially the Secretary of State, for aid, guidance, direction or order as to who it shall hear, or when, or how, I do not tolerate that suggestion at all. I am sitting here as a representative of an independent and equally historical branch of the Government of the United States, and I take no orders from the Secretary of State and no directions from him." *Texas Co.* v. *Hogarth*, No. 555, Folios 96-99.

In the case of *Northern Securities Co.* v. *United States*, 191 U. S. 555 (1903), a motion for leave to file a brief as *amici curiae* was denied to counsel not connected with the case for reasons in no way apt here, but the Chief Justice said, at pages 555, 556:

"Where in a pending case application to file briefs is made by counsel not employed therein, but interested in some other pending case involving similar questions, and consent is given, the court has always exercised great liberality in permitting this to be done. And doubtless it is within our discretion to allow it in any case when justified by the circumstances. *Green* v. *Biddle*, 8 Wheat. 1, 17; *Florida* v. *Georgia*, 17 How. 478, 491; *The Gray Jacket*, 5 Wall. 370."

In *The Employers Liability Cases*, 207 U. S. 463, at 490, the Court, after refusing a direct intervention by the Department of Justice, permitted the United States to appear and be heard as *amici curiae*.

This Court has permitted intervention by counsel to the British Embassy as *amici curiae* in the following recent cases:

Dillon vs. *Strathearn Steamship Co.*, 248 U. S. 182.

Strathearn Steamship Co. vs. *Dillon*, 251 U. S. 348.

Ex Parte Muir (*The Glenedeu*) No. 28, Oct. Term, 1918, argued January 7, 1919, still awaiting decision.

Texas Company v. *Hogarth*, No. 555 on the present calendar—to be argued with this case.

In the Circuit Courts of Appeal similar intervention as *amici curiae* by counsel representing Ambassadors, have been filed in the following cases:

Second Circuit—

The Claveresk, 264 Fed. Rep. 276.

The Carlo Powa, 259 Fed. Rep. 369.
Muir v. *Chatfield*, 255 Fed. Rep. 24.
Third Circuit—
The Adriatic, 258 Fed. Rep. 902.
Fifth Circuit—
The Strathearn, 256 Fed. Rep. 631.

Similar interventions have been allowed in several of the District Courts:

The Athanasios, 228 Fed. Rep. 558 (S. D. N. Y.).
The Strathearn, 239 Fed. Rep. 583 (N. D. Fla.).
The Maipo, 252 Fed. Rep. 627 (S. D. N. Y.).
The Adriatic, 253 Fed. Rep. 489 (E. D. Penna.).
The Rascric, 254 Fed. Rep. 154 (D. of N. J.).
The Claveresk, 254 Fed. Rep. 127 (S. D. N. Y.).
The Santa Cruz, (not reported, E. D. Va., June 28, 1919).

New York State Courts have also allowed similar intervention:

Nankivel vs. *Omsk All Russian Government*, New York Law Journal Oct. 28, 1920, not elsewhere reported.
Marine Transport Service Co. v. *Romanoff*, New York Law Journal, February 1, 1918, not elsewhere reported.

The English Admiralty Court in the case of the frigate *Constitution* allowed an even more informal intervention on behalf of the American Ambassador to Great

Britain than was made here in behalf of the Italian Embassy.

The Constitution, L. R. 4 P. D. 39.

So in *The Crimdon*, 35 Times Law Reports 81, intervention was allowed in the British Admiralty Court on filing of letters from a United States Shipping Board representative in England stating that the United States Shipping Board Emergency Fleet Corporation was a governmental agency, that it had the *Crimdon*, a Swedish vessel, under charter, and that she had been assigned to the United States Army Transport Service.

In the case of *The Roseric*, 254 Fed. 154, where a suggestion was filed by counsel for the British Embassy claiming immunity, Judge Rellstab of the District Court of New Jersey, in dealing with the question of such a suggestion, said 254 Fed. at page 163:

> "As to the source from which the suggestion came: What is to prevent one sovereignty from appearing in the courts of another sovereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable, practice for such suggestions to come through the Attorney General or one of his representatives; but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign's official

representative. True, in *The Luigi, supra*, upon an oral suggestion made in open court—seemingly as *amicus curiae*—for a foreign government—Judge Thompson said he 'was of the opinion that, inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government.'

"In the *Florence H, supra*, Judge Learned Hand declined to receive the suggestion made on behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this government. But I do not understand that either Judge Thompson or Judge Hand denied the power of the court to receive the suggestion through any other channels.

"There may be good reasons in a given case why a suggestion from a foreign sovereignty should not be entertained, save through the executive branch of the government, of which the court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own circumstances, and *The Luigi* and *The Florence H*, I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestions made on behalf of foreign governments, unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

"In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary,

from what has already been said concerning our national interests as a cobelligerent with the British government in the war pending at the time of the *Roseric's* seizure, they lead so obviously to an opposite determination that, in the absence of an intimation from the executive branch of this government that the public interests would be disserved by receiving such suggestion, its rejection would not be justified."

In the case of *The Maipo*, 252 Fed. 627, Judge Mayer said, at page 628, in dealing with the suggestion and certificate by the Chilean Charge d'Affaires:

"While, in many instances, the suggestion that a ship is the property and in the possession of a foreign government would be made to the court by the appropriate official or department of our own government, I fail to find any support for the proposition that such course is necessary. *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. It is enough that the fact is presented to the court, as here, by the duly accredited official of the foreign government.

"In response to an inquiry from proctors from the libelant and also for another shipper or consignee, our Department of State through the Third Assistant Secretary, has replied 'that the department has no intention of interfering with the legal proceedings to which you refer.' I cannot assume that this communication is intended to have any significance. It means, as I read it, nothing more than that the question is one for the courts to dispose of in due course. Doubtless the Chilean government has not deemed it necessary to bring the matter to the attention of the Department of

> State, but is willing, without further ado, that the points involved shall be passed upon by the court in orderly procedure without suggestion from our own government."

It would seem on principle apparently recognized by these authorities that a Court is at liberty in the exercise of *judicial discretion* to choose its own friends and to give to the information which they may communicate to it such weight as the Court considers the communications are entitled to receive.

Inasmuch as the purpose of the intervention is always stated to the Court when the intervention as *amicus curiae* is sought, the Court can in the exercise of its judicial discretion if it feels that the intervention is inadvisable refuse, on the threshold, to admit the intervention. Thus it is easily possible to prevent any embarrassment which might thereafter occur if the Court did not wish to give recognition to the statement which the *amicus curiae* purposes making.

The underlying error in the appellant's brief in dealing with the question of Ambassadorial intervention seems to be, that it fails to recognize the inherent right and power in a Court to choose its own friends, and also to realize that the necessary control which a Court has over the situation in every case will enable a Court to protect itself by refusing intervention whenever it thinks, in the exercise of a proper judicial discretion, wise to do so.

There have been recent instances where intervention by Ambassadors as *amici curiae* has been sought and denied.

In the case of *The Isle of Mull*, reported in 257 Fed. 798, Judge Rose, in the District Court of Maryland, refused to allow an intervention sought by the British Embassy similar to that allowed by Judge Hough in the case of *The Texas Company* v. *Hogarth Shipping Co., Ltd.*

In neither of those cases was immunity claimed. The suggestion merely was that the requisition was a governmental act. Judge Rose stated that before permitting intervention in such cases he would await an authoritative decision by a higher Court.

In the case of *The Appalachee*, 266 Fed. 923, Judge Smith, in the District Court for the Eastern District of South Carolina, also for reasons substantially the same as Judge Rose gave, refused to allow an intervention by the British Embassy claiming immunity.

The fact that these interventions were attempted does not appear in either of the opinions, but counsel for the appellants in this case represented the ship in both those cases and has full knowledge of the situation. The fact of the refusal of the intervention in those two cases is confirmed by the statements in the brief of counsel for the British Embassy filed by leave of this Court in the case of *The Texas Company* v. *Hogarth Shipping Company, Ltd.*, No. 555.

It is submitted that these refusals to permit ambassadorial intervention were erroneous. They involved an improper exercise of judicial discretion, and constituted appealable error for the reasons stated.

The Ambassador may instruct consular officers to intervene in various classes of litigation.

The intervention of consular officers in cases of suits by seamen before the present Seamen's Act came into force was a commonplace of procedure in such cases, and often led the Courts to refuse jurisdiction.

The Ester, 190 Fed. 216 and cases there cited.

Unreported cases where consular protests have been sustained in counsel's own experience are *Kicklakis* v. *The Hermia* in the Southern District of New York, and *Norsman* v. *The Overland* in the District of New Jersey.

Cf. *The Belgenland,* 114 U. S. 355, 364, 365.
Thompson v. *Rocca,* 223 U. S. 317.

In any event, it is not for private litigants to make objection to an ambassadorial intervention, whatever its form may be, or to assign error, if intervention is allowed. Objection can only properly be made by the Court itself or by our own Executive on proper diplomatic representation to the Ambassador who seeks to make the intervention or through him to his Government.

It is clear, therefore, that on principle and by well established precedent in our Courts, the District Court was right in allowing the intervention and suggestion of the Italian Ambassador in the present case.

Indeed, it is difficult to see how the ownership of a vessel by a Foreign Government or a foreign governmental act of any kind could be established in any feasibly prompt manner except by the statement in Court of the duly accredited representative of the Government in question.

And it would be a strict and hard doctrine to hold that the accredited Ambassador of a friendly for-

eign nation should be denied access to our Courts to protect his country's vessels, rights and nationals unless he first secured permission from our State Department!

Foreign Ambassadors are not Ambassadors to the State Department but to the United States. The State Department accepts their credentials and then they are free to act in any matters according to diplomatic usage.

It is true that most communications which they may wish to make are of a diplomatic nature and are made to the Executive through the State Department.

But as Judge Hough points out the Judiciary is an independent branch of our government.

So why should not an Ambassador communicate to our Courts regarding matters which in his opinion involve his sovereign's rights or interests, whether it be as to vessels or other property, or as to his country's nationals, provided always that his communications take such form as may be satisfactory to our Courts?

The appellants contend that the suggestion should have come through the State Department.

The only cases in which the State Department has transmitted, through the Department of Justice, to the attention of a Federal Court during the recent war any information received from an Embassy was in the cases of *The Luigi*, 230 Fed. 493 and *The Attualita*, 238 Fed. 909. A certified copy of the record in *The Attualita* in the Circuit Court of Appeals for the Fourth Circuit is herewith submitted.

The suggestion, which was the same in form as in *The Luigi*, was there filed by the United States Attorney for the Eastern District of Virginia, as will be seen by an

examination of the record of that case at page 8, did not certify to the truth of the statement of the Italian Embassy and did not even make a prayer for immunity, but merely submitted the fact that the vessel was requisitioned by and in the service of the Italian Government for such consideration as the Court might deem necessary and proper.*

It is difficult to see how such a procedure differs in any essential way from the procedure followed here, where the Secretary of State has certified to the fact that the Italian Ambassador, who makes the suggestion, is the duly accredited Ambassador from the Kingdom of Italy to Washington.

The procedure in *The Attualita* and *The Luigi* was merely a round-about way of doing something which was as conventionally and properly done in a direct way in this case.

The Italian Embassy had to appear by counsel as *amici curiae* in both *The Attualita* and *The Luigi.*

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* The suggestion in the *Attualita* was as follows:

I, Richard H. Mann, United States Attorney for the Eastern District of Virginia, acting under the direction of the Attorney General of the United States, respectfully bring to the attention of the Court that the Attorney General of the United States has received from the Secretary of State of the United States a communication dated September 15, 1916, to the effect that the Secretary of State has been advised by the Italian Ambassador that the Italian Steamship *Attualita* which has been libeled and attached in this proceeding, was at the time of the said attachment and is now requisitioned by the Italian Government; and was at the time of said attachment and is now in the service of the Italian Government; and I am further directed to call the attention of this Court in this connection of *The Luigi*, 230 Federal Reporter 493.

In bringing this matter to the attention of the Court, the United States does not intervene as an interested party, nor do I appear either for the United States or for the Italian Government, but I present the suggestion as *amicus curiae*, as a matter of comity between the United States Government and the Italian Government, for such consideration as the Court may deem necessary and proper.

RICHARD H. MANN,
United States Attorney.

By HIRAM E. SMITH,
Asst't United States Attorney.

III. *The suggestion of the Italian Ambassador conclusively establishes the fact that the ownership and possession of the steamship "Pesaro" was in the Italian Government and precluded any further judicial inquiry regarding such ownership or possession.*

The reason for this rule, which is thoroughly established, is that to submit to a judicial investigation of the facts stated in the suggestion would be to submit to the jurisdiction of the Court and it is well settled that a foreign sovereign or Government can not be made subject *in invitum* to the jurisdiction of our Courts.

In the case of *The Parlement Belge*, L. R. 5, P. D. 197, in which the English Court of Appeal held that an unarmed packet belonging to the King of the Belgians was immune from process in spite of the fact that the vessel carried merchandise for freight and passengers for hire, Lord Justice Brett said in dealing with the conclusiveness of the representations, at page 219 (Italics ours):

> "* * * the ship has been by the sovereign of Belgium, by the usual means, declared to be in his possession as sovereign, and to be a public vessel of the state. It seems very difficult to say that any Court can inquire by contentious testimony whether that declaration is or is not correct. *To submit to such an inquiry before the Court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war that declaration cannot be inquired into.* That was expressly decided under very trying circumstances in the case of *The Exchange*. *Whether the ship is a public ship used for national purposes seems to come within the same rule.*"

In Hall on International Law (4th Ed.) Sec. 44, page 167, it is said (Italics ours):

> "Public vessels of the state consist in ships of war, in government ships not armed as vessels of war, such as royal or admiralty yachts, transports, or store ships, and in vessels temporarily employed, whether as transports or otherwise, provided that they are used for public purposes only, that they are commanded by an officer holding such a commission as will suffice to render the ship a public vessel by the law of his state, and that they satisfy other conditions which may be required by that law. [Ortolan, Dip. de la Mer, i. 181-6; Calvo, §876-84.] The character of a vessel professing to be public is usually evidenced by the flag and pendant which she carries, and if necessary by firing a gun. When in the absence of, or notwithstanding, these proofs any doubt is entertained as to the legitimateness of her claim, the statement of the commander on his word of honour that the vessel is public is often accepted, but the admission of such statement as proof is a matter of courtesy. On the other hand, subject to an exception which will be indicated directly, the commission under which the commander acts must necessarily be received as conclusive, it being a direct attestation of the character of the vessel made by competent authority within the state itself. [The Santissima Trinidad, vii Wheaton, 335-7; Ortolan, Dip. de la Mer. i. 181; Phillimore, i § ccexlviii.] *A fortiori attestation made by the government itself is a bar to all further enquiry.*"

In a foot note to this section, in dealing with the word of honour of a Commander, the author says:

> "The admission of the word of the commander is sometimes regarded as obligatory. When the *Sumter* was allowed to enter the port of Curacao, the Dutch government answered the complaints of the United States by pointing out that the commander had declared the vessel to be commissioned, adding that 'le gouverneur néerlandais devait se contenter de la parole du commandant, couchée par ecrit.' Ortolan, Dip. de la Mer, i. 183."

In a foot note dealing with an attestation made by a government, and citing *The Parlement Belge*, the author says:

> "This (i.e. attestation by a government) is the case even where on the acknowledged facts there may be reasonable doubt as to whether the vessel is so employed as to be in the public service of the state in a proper sense of the term."

This section from Hall was quoted with approval by Mr. Justice Brown in the case of *Tucker* v. *Alexandroff*, 183 U. S. 424, at page 441.

The conclusiveness of such suggestions has been recognized and the rule laid down in Judge Knox's memorandum has been approved in many leading cases in this country. Examples are:

The Exchange, 7 Cranch. 116.
The Maipo, 252 Fed. 627.
The Adriatic, 253 Fed. 489.
The Roseric, 254 Fed. 154.

Agency of Canadian Car & Foundry Co. v. *American Can Co.*, 258 Fed. 363; affirming 253 Fed. 152.

The Adriatic, 258 Fed. 902.

The Carlo Poma, 259 Fed. 369.

The Claveresk, 264 Fed. 276, 280.

Texas Company v. *Hogarth*, 267 Fed. 1023, affirming 265 Fed. 375.

To the same effect are also many English cases:

The Constitution, L. R. 4, P. D. 39.

The Crimdon, 35 T. L. R. 81.

In the Goods of Anne Dumoy, 3 Hagg. Eccl. 767.

In the Goods of Klingemann, 3 Swab. & T. R. 18.

In the Goods of Prince Oldenberg, L. R. 9 P. D. 235.

At page 34 of the appellants' brief they make the statement that in the case of *The Attualita*, 238 Fed. 909, evidence was taken in respect of the relation of the Italian Government to the *Attualita*, in spite of the fact that a suggestion had been filed by the United States Attorney.

Counsel for the appellee in the present case was counsel for the libelant in the *Attualita* case and has knowledge of all the proceedings had therein.

The explanation of the fact that testimony was taken was that counsel for the libelant, while he admitted that he could not challenge the truth of the statements contained in the suggestion, demurred to them on the ground that inasmuch as they did not state either ownership or

possession in the Italian Government, they did not state sufficient reasons for claiming that the *Attualita* was a public ship or immune for any other reason.

In the case of *The Santissima Trinidad*, 7 Wheaton 283, Mr. Justice Story, held conclusive the proof of ownership of a vessel by a foreign sovereign, where the Commission of her captain was introduced in evidence. He said at pp. 335-336—

> "It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause introduced, to corroborate it. The only point is, whether, supposing them true, they afford satisfactory evidence of her public character. We are of opinion that they do. In general, the commission of a public ship signed by the proper authorities of the nation to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in

public convenience and policy, and cannot be broken in upon, without endangering the peace and repose, as well of neutral as of belligerent sovereigns."

To the same effect is *The Exchange*, 7 Cranch. 116, where Chief Justice Marshall said, at page 147:

"The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, *The Exchange* must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a *right to assert his title in [*147] those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, *The Exchange* being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the Amer-

> ican territory, under an implied promise, that, while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.
>
> If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."

The procedure of Ambassadorial intervention and proof of facts without oath and without any cross-examination is therefore seen to be thoroughly settled in our law. The basis of the doctrine has been the subject of some speculation.

One theory of the credence given to suggestions and certificates of foreign diplomatic officers which should perhaps be here called to the Court's attention, is that inasmuch as the fact of ownership and possession of the vessel has been submitted by the Ambassador in proper form to the Court, the Court is entitled to take judicial notice thereof.

Cf. *Talbot* v. *Seeman*, 1 Cranch. 1, 38.

In Jones *vs.* United States, 137 U. S. 202, Judge Gray said at page 216:

> "In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. Gresley Eq. Ev. pt. 3, c. 1; *Fremont* v. *United States*, 17 How. 542, 557; *Brown* v. *Piper*, 91 U. S. 37, 42; *State* v. *Wag-*

ner, 61 *Maine*, 178. Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. *Spring* v. *Eve*, 2 Mod. 240; 1 Hale's Hist. Com. Law (5th ed.) 19-21; *Gardner* v. *Collector*, 6 Wall. 413; *South Ottawa* v. *Perkins*, 94 U. S. 260, 267-269, 277; *Post* v. *Supervisors*, 105 U. S. 667. As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the Foreign Office or the Department of State. *Taylor* v. *Barclay*, above quoted; *The Charkieh*, L. R. 4 Ad. & Ec. 59, 74, 86; *Ex parte Hitz*, 111 U. S. 766; *In re Baiz*, 135 U. S. 403."

It might be remarked in this connection that inquiry is often made by our Courts of the Department of State as to the recognition of a foreign Government and of the diplomatic character of its representatives and the replies made by the State Department are considered as conclusive on the Courts.

American Banana Co. v. *United Fruit Co.*, 160 Fed. 184, at 187; 166 Fed. 261, 265; affirmed 213 U. S. 247

Jones v. *United States*, 147 Fed. 202, 205, 206

In re Baiz, 135 U. S. 403, 425, 427

Ex parte Hitz, 111 U. S. 766, 767

Another theory is that this procedure is an exception to the general rules of evidence and that the ownership and possession of the vessel are facts which have been presented to the Court from a source deemed sufficient by the Court to warrant attributing such weight to the

suggestion as to render it conclusive proof of the facts therein stated.

Another theory is that inasmuch as the Italian Government is a Government recognized by the United States and the seal of its Embassy has been annexed to the Special Appearance and Suggestion of the Ambassador and our State Department has certified to the Suggestion under the seal of the State Department, the document proves itself, under or under analogy to the principle that Courts of the United States take judicial notice of Foreign Nations and their seals of State.

Schoerken v. Swift & Courtney & Beecher Co., 7 Fed. 469, 471
Lincoln v. Battell, 6 Wend. (N. Y.) 475, 481
Cf. also: *Robinson v. Gilman*, 20 Maine 290
Watson v. Walker, 23 N. H. 471
Phillips v. Lyons, 1 Texas 592

A third theory is that of Mr. Wigmore who concedes the admissibility of such an ambassadorial certificate, and classes it as an exception to the Hearsay Rule, under the heading of "Sundry Official Certificates."

Wigmore on Evidence, Vol. III. Sec. 1674, note on page 2089.

The basis of Mr. Wigmore's theory is somewhat obscure. In fact none of the theories advanced seem to cover the situation satisfactorily. This may be so because common-law rules of evidence are unconsciously invoked in an international law situation.

Perhaps the true explanation of the admission of Ambassadorial certificates as conclusive proof of the facts therein stated is, that it is a part of the law of evidence of *International Law*, that proof of facts of a governmental nature is allowed to be made by a person who by reason of his peculiar status does not have to make oath, (*Hall on International Law* (4th Ed.), Section 53, pages 190 and 191; and *The United States* v. *Wagner*, L. R. 2 Chancery Appeals 583), and cannot be cross-examined, or otherwise impeached in a court which, without his consent, has not jurisdiction over him.

The Parlement Belge, L. R. 5 P. D. 197
The Exchange, 7 Cranch 116, 147
The Adriatic, 258 Fed. 902; affirming 253 Fed. 489
The Roseric, 254 Fed. 154
Agency of Canadian Car & Foundry Co. v. *American Can Co.*, 258 Fed. 363; affirming 253 Fed. 152
The Carlo Poma, 259 Fed. 369
Tucker v. *Alexandroff*, 183 U. S. 424, 441

Something, perhaps, remains to be said here concerning the contention made in the appellant's brief as to the kind of question involved in the Ambassador's suggestion in this case.

The appellant seems to claim, in the second part of his brief, that the Ambassador's suggestion must necessarily be considered either to raise a political or a judicial question; that if it raises a political question it should come through the State Department, and if it raises a judicial question, it may be controverted.

The answer to this contention is that there are a great many facts which cannot properly be called political facts, and at the same time are not justiciable facts.

The facts to which we refer may properly be called diplomatic facts or governmental facts or foreign administrative facts.

As is above shown, there is no jurisdiction over foreign sovereigns in our Courts under our Constitution.

This Court has under Article 3, Section 2, of the Constitution, original jurisdiction "in all cases affecting Ambassadors, other public ministers and consuls" only.

The result is that there are a large number of facts concerning foreign nations that are not justiciable in our Courts because there is no jurisdiction given over them by the Constitution.

It has been held that the decision of questions of a political nature is exclusively for the Executive and Congress.

The Divina Pastora, 4 Wheat. 52.

The decision of the Executive branch of the Government in respect of such matters is conclusive on the Judicial Department.

Williams v. *Suffolk Ins. Co.*, 13 Pet. 415.

Examples of Political Questions are:
Recognition of States or Nations,

Jones v. *U. S.*, 137 U. S. 202.
U. S. v. *Lynde*, 11 Wall. 632.
Kennett v. *Chambers*, 14 How. 38.

Gelston v. *Hoyt*, 3 Wheat. 246.
Rose v. *Himely*, 4 Cranch. 241.
The Nueva Anna, 6 Wheat. 52.
U. S. v. *Palmer*, 3 Wheat 610.

Accession and conquest of territory.

Hornsby v. *U. S.*, 10 Wall. 224.

Military occupation of subjugated territory.

Neely v. *Henkel*, 180 U. S. 109.

Foreign relations and policy.

The Nereide, 9 Cranch. 388.

Claims *v.* foreign government.

Comegys v. *Vasse*, 1 Pet. 193.

Policing of international waters.

Re Cooper, 143 U. S. 472.

Adjustment of political boundaries.

Foster v. *Neilson*, 2 Pet. 253.
Garcia v. *Lee*, 12 Pet. 511.
U. S. v. *Arredondo*, 6 Pet. 691.

Relations with the indian tribes.

Cherokee Nation v. *Georgia*, 5 Pet. 1.
U. S. v. *Holliday*, 3 Wall. 407.

Cession of territory by state to nation.

Burton v. *Williams*, 3 Wheat. 529.

Adoption and validity of constitutions.

Luther v. *Borden*, 7 How. 1.

Political and civil rights of persons.

Georgia v. *Stanton*, 6 Wall. 50.

Examples of non-justiciable governmental facts are: The title of foreign government owned vessels, such as is involved in this case and *The Carlo Poma*.

That a certain act was a governmental act of a foreign Government.

The Adriatic, 253 Fed. 489.
The Claveresk, 264 Fed. 276, 280.
Cf. *Texas Co.* v. *Hogarth*, 265 Fed. 375, aff'd 267 Fed. 1023.

Proof as to the status of a governmental commission.

Agency of Canadian Car & Foundry Co. v. *American Can Co.*, 258 Fed. 363, 368.

Doubtless other instances could be added but the above will suffice to indicate the nature of non-justiciable governmental facts.

The fact to which the Ambassador certified in his suggestion was the ownership by the Italian Government and the possession in the Italian Government of the steamship *Pesaro*, and since he has so certified the question is not justiciable in our Courts because it is a fact not concerning an Ambassador but a fact concerning a foreign sovereign and a foreign sovereign does not have to submit himself to the jurisdiction.

IV. *Inasmuch as the "Pesaro" was conclusively shown at the time of the issuance of process to be owned by and in the possession of the Italian Government, she was entitled to immunity under well settled principles of international law.*

The reason for this is stated in the case of *The Exchange*, 7 Cranch 116, by Chief Justice Marshall, which is the leading case on the subject, at page 136:

> "The world being composed of distinct sovereignties possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. * * * One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. * * * Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be con-

> sidered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise."

In the case of *The Parlement Belge,* L. R. 5, P. D. 197, Lord Justice Brett, after quoting the authorities, stated the principle as follows, at page 214:

> "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

A very recent well considered English case which followed and applied the decision of *The Parlement Belge,* (1880), L. R. 5 P. D. 197, is the case of *The Porto Alexandre,* (1920) Probate 30, in the English Court of Appeal.

The *Porto Alexandre* was formerly a German owned ship named *Ingbert,* which, by a decree of the Portuguese Prize Court, on January 30, 1917, was adjudged a lawful prize of war. She had been previously requisitioned by the Portuguese Government and handed over to the Commission for Service of Transports Maritime and was

being employed in ordinary trade voyages earning freight for the Government. On September 13, 1919, she got aground in the River Mersey and salvage services were rendered to her by three Liverpool tugs.

On September 16th, a writ *in rem* on behalf of the owners, masters and crews of these tugs was issued against the *Porto Alexandre*, her cargo and freight.

Mr. Justice Hill, following *The Parlement Belge*, ruled that the steamship was immune and the plaintiffs appealed.

By unanimous decision of the Court of Appeal, the decision below was affirmed.

Lord Justice Scrutton's opinion is especially illuminating. On page 36, he said (Italics ours):

> "Now this State and other states proceed in their jurisprudence on the assumption that sovereign states are equal and independent, and that as a matter of international courtesy no one sovereign independent state will exercise any jurisdiction over the person of the sovereign or the property of any other sovereign state; and now that sovereigns move about more freely than they used to, and do things which they used not to do, and now that states do things which they used not to do, the question arises whether there are any limits to the immunity which international courtesy gives as between sovereign independent states and their sovereigns. I think it has been well settled first of all as to the sovereign that there are not limits to the immunity which he enjoys. His private character is equally free as his public character. If he chooses to come into this country under an assumed name and indulge in privileges not peculiar to sovereigns, of making

promises of marriage and breaking them, the English Courts still say on his appearing in his true character of sovereign and claiming his immunity, that he is absolutely free from the jurisdiction of this Court. That is the well-known case of *Mighell* v. *Sultan of Johore* (1894) 1 Q. B. 149. It has been held, as Mr. Dunlop admits, in *The Parlement Belge*, 5 P. D. 197, that trading on the part of a sovereign does not subject him to any liability to the jurisdiction. His ambassador is in the same position; an ambassador coming here as an ambassador of the sovereign may engage in private trading, but it has been held that his immunity still protects him even from proceedings in respect of his private trading. Jervis C. J. in *Taylor* v. *Best* (1854) 14 C. B. 487, 519, said: '. . . if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the proviso in the 22 Anne, c. 12, s. 5, in the case of an ambassador's servant. If an ambassador or public minister, during his residence in this country, violates the character in which he is accredited to our Court, by engaging in commercial transactions, that may raise a question between the Government of this country and that of the country by which he is sent; but he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character,—the proviso in the statute of Anne limiting the privilege in the cases of trading applying only to the servants of the embassy.' There being no limitation in the case of the sovereign, and no limitation in the case of the ambassador, is there any limitation in the case of the property? Mr. Dunlop has argued before us that in the case of property

of the state there is a limitation, and that—as I understand him—if the property is used in trading that cannot be for the public service of the state. That is not the way in which he expressed it, but it appears to me to be the proposition which emerges from his argument.

"We are concluded in this Court by the decision in *The Parlement Belge*, 5 P. D. 197, 217. Sir Robert Phillimore took the view that trading with the property of a state might render that property liable to seizure; but the court of Appeal in *The Parlement Belge*, overruled the views of Sir Robert Phillimore, as I understand them. The principle then laid down has been recited by the other members of the Court. Brett, L. J. said: 'As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use.' One of the reasons given seems to me conclusive: the moment property is arrested in the Admiralty Court a proceeding is instituted against the person, and the person is compelled to appear if he wants to protect his property, and by seizing his property the personal rights of the sovereign or the personal rights of the state are interfered with. The position seems to me to be very accurately stated in the 7th edition of Hall's International Law at p. 211, where, after dealing with warships and public vessels, so called, Mr. Hall goes on to deal with other vessels employed

in the public service and property possessed by the state within foreign jurisdiction, and says: 'If in a question with respect to property coming before the Courts a foreign state shows the property to be its own, and claims delivery, jurisdiction at once fails, except in so far as it may be needed for the protection of the foreign state.'

"I quite appreciate the difficulty and doubt which Hill, J., felt in this case, because no one can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult; but it seems to me the remedy is not in these Courts. *The Parlement Belge* excludes remedies in these Courts. But there are practical commercial remedies. If ships of the state find themselves left on the mud because no one will salve them when the State refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships. *These are matters to be dealt with by negotiations between Governments, and not by Governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent and sovereign states.* While appreciating the difficulties which Hill, J., has felt, I think it is clear that we must, in this Court, stand

by the decision already given, and the appeal must be dismissed.'"*

Another practical aspect of the matter is well dealt with by Judge Mayer in the case of *The Maipo*, 252 Fed. 627, where he says at page 631:

> "While diplomatic questions are beyond the Court's province, yet practical considerations of comity are not to be lost sight of. The exigencies and requirements of this extraordinary war may

* Other English cases in which immunity has been granted are as follows:
To war vessels:
The Constitution, L. R. 4 P. D. 39;
The Prins Frederik, 2 Dod. 451.
To a sovereign:
Mighell v. *Sultan of Johore*, (1894) 1 Q. B. 149;
Duke of Brunswick v. *King of Hanover*, 2 H. L. Cas. 1.
To public vessels owned by Foreign Sovereigns although not war vessels:
The Jassy, (1906) Probate 270;
The Gagara, (1919) Probate 95.
To a Canadian ferryboat owned by the Canadian Government:
Young v. *Scotia*, (1903) App. Cas. 501.
To vessels owned, requisitioned or chartered by Governments:
The Broadmayne, (1916) Probate 64;
The Messicano, 32 T. L. R. 519;
The Errissos, Lloyd's List, Oct. 24, 1917;
The Crimdon, 35 T. L. R. 81.
To property or funds of Foreign Sovereigns:
Vavasseur v. *Krupp*, L. R. 9, Ch. D. 351;
De Haber v. *Queen of Portugal*, 17 Ad. & El. (N. S.) 175, 204;
Wadsworth v. *Queen of Spain*, 17 Ad. & El. (N. S.) 171, 215.
Our Courts, in addition to *The Exchange*, 7 Cranch. 116, where immunity was extended to a French war vessel under very trying circumstances have extended it—
To vessels owned by Foreign Governments and in possession of naval officers:
The Pampa, 245 Fed. 137;
The Maipo, 252 Fed. 627.
To lightships:
Briggs v. *The Light Ships*, 11 Allen, Mass. 157.
To municipal tugs:
The Fidelity, 9 Ben. 333; 16 Blatch. 569.
To privately owned vessels under requisition to the British Government and classed by it as admiralty transports:
The Roserie, 254 Fed. 154.
To a Foreign Government:
Hassard v. *United States of Mexico*, 29 Misc. 511; affirmed 173 N. Y. 645.
To funds of a Foreign Government owned Railway:
Mason v. *Intercolonial Railway*, 197 Mass. 349.

well lead (and possibly already has led) our government to man otherwise commercial ships with American naval officers and men, to the end that our ships may be protected while our needs in various directions may be supplied in foreign ports. These enterprises may, in some instances, be regarded (technically speaking) as commercial, but may, in substance, be of benefit to the people at large. Time is of vital importance to every ship, of whatever nationality, which sails the seas. To be detained by process at this time may cause damage not capable of money measurement. Indeed, it would not be surprising if at no distant date large numbers of vessels setting out from various ports of various countries would be manned as government vessels for the very purpose of assuring quick clearance and freedom from process. Whatever loss or inconvenience, if not safeguarded against, might thus result either to our people when dealing with foreign ships or to foreign peoples when dealing with us, is the price which the individual is paying for the ultimate benefit of his country."

The fact that actual possession was not in the sovereign is the explanation of the decisions in

The Johnson Lighterage Co. No. 24, 231 Fed. 365 (involving the salvage of Russian munitions).

Long v. *The Tampico*, 16 Fed. 491 (involving claims for salvage of Mexican revenue cutters which had just been built but had not been placed in Mexican public service and in respect of which the claim of immunity was

not made by a properly authorized Mexican Government agent).

That neither ownership nor possession was in the sovereign explains the decisions in:

The Attualita, 238 Fed. 909 (a privately owned requisitioned Italian vessel not rated as a transport).

The Florence H., 248 Fed. 1012 (a United States cargo vessel in possession of the United States Shipping Board Emergency Fleet Corporation, a private company).

The difference, as usually stated, between our law and the English law in regard to immunity, is thus put by Judge Ward, in the case of *The Carlo Poma*, 259 Fed. 369. He there says at page 370:

"The English Courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. *The Parlement Belge*, Law Reports, 5 P. D. 197; *The Jassy* (1906), P. 270.

The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time process is served. *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *Long* v. *The Tampico* (D. C.) 16 Fed. 491; *The Attualita*, 238 Fed. 909, 152 C. C. A. 43."

The tendency of our law, we think, can fairly be stated to be towards the English doctrine as is instanced by the case of *The Roseric*, 254 Fed. 154, in which, although technical possession was not in the British Government, the immunity asked for was granted on the ground that the vessel was in Government service.

This decision seems much more consonant with modern conditions than the narrower rule of *The Davis*, which was adopted, it must always be remembered in respect of our own Government whose rights and claims against which are justiciable in our courts.

Indeed when ownership is in a Foreign Sovereign it is doubtful whether possession would or should be material, if the Sovereign intervenes in the proper way to claim immunity for his property.

There is not any case in our reports where a vessel *owned* by a Foreign Sovereign has been held except *Long* v. *The Tampico*, 16 Fed. 491, and in that case immunity was claimed for the vessels by a private person who was unable to show his authority. The case is, therefore not a precedent for holding a foreign government owned vessel when proper claim of immunity is made. Indeed Judge Addison Brown implies that if the vessels had gone into the public service of Mexico immunity would have been granted.

In *The Tampico* it was found as a further ground for disallowing immunity that the vessel had not yet gone into the public service of Mexico. Hence it is not contrary to Judge Rellstab's decision in *The Roseric*, 254 Fed. 154.

In the present case both ownership and possession were in the Italian Government and, consequently, all the requirements for immunity under the strictest American decisions have been met.

It is contended in pages 20 to 27 of the brief for the appellant that Section 9 of the original Shipping Act of 1916, providing that merchant vessels owned by the United States when used solely as merchant vessels, shall be subject to all laws, regulations and liabilities governing merchant vessels, which was re-enacted by the Merchant Marine Act of 1920, approved June 5, 1920, indicates that our Government for its own vessels in its own Courts has adopted the principle that if the vessels are employed as merchant vessels they should not be immune from suit.

It is curious, however, that the Merchant Marine Act, 1920, while it does repeal and amend certain previous Acts, has not any general provisions for repealing of all Acts inconsistent therewith, and, consequently, the Suits in Admiralty Act, approved March 9, 1920, is still in force. In that Act, by Section 1* suits *in rem* against merchant vessels owned and operated by the United States and by corporations, the whole of whose capital stock is owned by the United States, are rendered immune from process *in rem* in our Courts.

*Section 1 of the Suits in Admiralty Act reads as follows:

That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company.

The Suits in Admiralty Act then provides for suits *in personam* against the United States in respect of such causes of action as might have been brought against the vessels and details the procedure. In Section 7, procedure in the event of arrest of vessels in foreign Courts is covered.*

Section 7 is entitled in the margin "*Vessels and cargo immune from suit in foreign countries,*" and provides for the claiming of immunity of United States owned vessels, for the giving of bonds in the event that immunity is waived, or that the immunity claimed is over-

*Section 7 of the Suits in Admiralty Act is as follows:

"That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States Consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulater as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: PROVIDED, HOWEVER, That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case."

ruled, and contains the express provision "that nothing in this section shall be held to prejudice or preclude a claim of immunity on such vessel or cargo from foreign jurisdiction in a proper case."

It is difficult to conceive how the appellant can properly found an argument that the United States should, on account of these statutes, hold a vessel owned by a foreign sovereign to process in our Courts if the foreign sovereign chooses to assert the immunity which is his.

It is perfectly clear that the re-enactment of Section 9 of the Shipping Act of 1916, in the Merchant Marine Act of 1920, was merely a declaration of policy as to allowing suits in our own Courts in respect of admiralty claims against United States owned vessels used for carrying cargo, and that by the Suits in Admiralty Act of March 9, 1920, the procedure to be followed in such claims against the United States was set forth.

The Suits in Admiralty Act is a really remedial or practice act, and in so far as it deals with the question of immunity, sustains it in every respect because it gives immunity to United States vessels in our own Courts and reserves the right to claim immunity in foreign Courts.

That the United States is as particular as any monarchical government ever was in the maintenance of its sovereignty and in resisting any act in derogation of its sovereign rights is shown in a very interesting way in the argument of Mr. Caleb Cushing in the case of *The Sapphire*, 11 Wall. 164, as it is quoted in the Lawyers

Co-operative Edition of the United States Supreme Court Reports, Vol. 20, pages 127 to 128.

In that case Mr. Cushing stated that he had been counsel for the United States in English Courts in a number of cases and that there was no question but that a foreign sovereign could commence proceedings in the Courts of a friendly nation and that to refuse him this right would, perhaps, be a *casus belli*.

In arguing for the right of a foreign sovereign to appear in our Courts, Mr. Cushing, speaking of a case in which he had been of counsel for the United States in the English Courts in which the question of the style under which the sovereign should sue and the practice of discovery in suits by a sovereign arose, said:

> "Next, the English lawyers and judges boggled on the question how to obtain discovery from a plaintiff Republic.
>
> "This question was made in the case of *The U. S. v. Wagner*, L. R. 2 Ch. App. 583.
>
> "Vice Chancellor Wood opined that the President of the United States must act for or be joined with the United States.
>
> "We, the United States replied: The President cannot lawfully and, therefore, will not and shall not appear as plaintiff, or make discovery on oath, for or with the United States; and so the case went to the Court of Appeals in chancery.
>
> "That court, consisting of the Chancellor, Lord Chelmsford, and the Lords Justices, Sir George James Turner and Lord Cairns, agreed that the President could not be compelled to appear and so overruled the Vice-Chancellor.
>
> "But thereupon, said the Vice Chancellor, some Corporeal person must appear to disclose

on oath, the Attorney General or the Secretary of State. We replied: no, neither they nor anybody else. The United States will make disclosure under its great seal, duly certified by its lawful keeper, the Secretary of State, and in no other form or manner; and if you do not rest content with this, say so, and we will make it a case of insulted national dignity and honour, quite as full of political meaning as the Alabama. And so we filed our answer under the great seal."

Perhaps it is worth considering that the practical results of following the well-settled law and declaring the immunity of vessels owned by foreign governments does not mean that we shall be faced for years to come with having vessels which are immune from the process of our Courts come into our ports.

While the law is now settled that such vessels are immune, the situation may clear itself in the manner suggested by Lord Justice Scrutton in the quotation above made from his opinion in *The Porto Alexandre*, 1920 Probate 30, by persons refusing to deal with foreign government owned vessels if claims of immunity persist.

The situation may, of course, be cured by negotiations between the Governments who own the vessels and the making of mutual agreements as to waiver of immunity for vessels used commercially.

If the first process should be considered too slow and the second process should not be feasible because other Governments would not agree to submit vessels which they own, although used commercially, to the process of our Courts, there is a third method of dealing with the situation.

The United States can pass any laws it wishes prescribing the terms on which foreign vessels shall use our ports.

Mr. Justice Brewer said in the case of *Patterson* v. *The Bark Eudora*, 190 U. S. 169, at page 178:

> "The implied consent of this Government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such permission and conditions as the Government sees fit to impose."
>
> Cf. *The Exchange*, 7 Cranch. 116, 149.

If the commercial use of immune vessels by Foreign Governments becomes a serious menace to our ships and citizens, it would be possible and proper, it is submitted, for Congress to pass an act providing that any Foreign Government owned vessels entering our ports for commercial purposes would be deemed in all respects to have the status of privately owned vessels and be subject to all the liabilities of privately owned vessels.

Such a declaration of policy would be notice to the world of a change of status of such Foreign Government owned vessels within our jurisdiction. And after the passage of such an act immunity could not be claimed because such vessels would be deemed to have waived immunity by coming into our ports.

But until such legislation is passed the well-settled rules of international law prevail, because, as Chief Jus-

tice Marshall said in *The Exchange*, 7 Cranch. 116, the case which is the commencement of all the jurisprudence on this subject, at page 147 (Italics ours):

> "It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction.
>
> Without doubt the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. *But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals,* which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, *ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.*"

The appellants further claim that the extent of the immunity which should be allowed be regulated by the nature of the case.

The difficulty with this argument is that this case involves a Foreign Sovereign; and that Foreign Sovereign, far from consenting to waive his immunity, is very strongly urging it.

Until, therefore, by appropriate action of Congress, the United States shall have given notice to the world of a change in our policy towards Foreign Government owned vessels, there exists a kind of international estoppel against holding such vessels under the process of our Courts.

Until the rules are changed by the proper authority, it is submitted, our Courts must play the game in accordance with the rules.

THIRD POINT.

THE ATTEMPT ON THE PART OF THE APPELLANTS TO PROVE ITALIAN LAW IS IMPROPER AND THAT PORTION OF THEIR BRIEF SHOULD BE STRICKEN OUT.

The appellants have attempted to establish the law of Italy with regard to immunity by arguing the question at pages 30 and 31 of their brief and appending to their brief an opinion of an alleged Italian Advocate.

It is and has been from earliest times well settled that foreign law must be proved as a fact.

Armstrong v. *Lear*, 8 Peters 52.
Church v. *Hubbart*, 2 Cranch. 187.
Talbot v. *Seeman*, 1 Cranch. 1.
Liverpool & Great Western Steam Co. v. *Phoenix Ins. Co.*, 129 U. S. 397.

It really is absurd for the appellants to be contending that the certificate of a duly accredited foreign minister is not evidence as to the status of the *Pesaro* as a public

vessel because they have not an opportunity of cross-examining the Ambassador, when, at the same time, they are endeavoring to prove Italian law by a letter from an alleged Italian Advocate without any opportunity on the part of the appellees to examine the Advocate on the matters set forth in his letter.

By both their contentions they are running counter to well settled legal principles.

The part of the brief dealing with the question of the Italian Advocate's opinion, together with the appendix containing the opinion, should be stricken from the files of the Court.

FOURTH POINT.

AS THE "PESARO" WAS RELEASED WITHOUT BOND IT IS A GRAVE QUESTION WHETHER THERE IS ANY REAL QUESTION TO ADJUDICATE.

Another interesting question arises in connection with the motion to dismiss, namely, as to the status of a procedure of this kind *in rem* when the *res* has been discharged without the giving of any bond or security.

It seems that under such circumstances, the case has become a *moot case* because it is of the essence of a proceeding *in rem* that there should be *a res*, or its equivalent before the Court.

The Fidelity v. *United States*, 1 Sawyer, 153; Fed. Cas. 4755.

The Alliance, 70 Fed. 273, 275 (1905), decided by the C. C. A. for the 9th Circuit, Mr. Justice McKenna, who was then Circuit Judge, presiding.

Waples on "*Proceedings in Rem*," page 54.

Works on "*Courts and their Jurisdiction*," page 54.

Here the *Pesaro* has been released and no bond filed or undertaking to give a bond substituted for her, as was done in the matter of *Muir as Master of the Gleneeden* v. *Chatfield* now before this Court.

It is doubtful, therefore, whether this Court will deem itself forced to consider the other more interesting questions hereinabove discussed.

LAST POINT.

THE ORDER OF THE DISTRICT COURT APPEALED FROM WAS CORRECT AND, UNLESS THE APPEAL IS DISMISSED ON THE PRACTICE QUESTION RAISED IN THE FIRST POINT, THE DECISION BELOW SHOULD BE IN ALL RESPECTS AFFIRMED AND THE IMMUNITY OF THE STEAMSHIP PESARO DECLARED BY THIS COURT.

Respectfully submitted,

JOHN M. WOOLSEY,
Of Counsel.

January 15, 1921.

SUPREME COURT OF THE UNITED STATES.

No. 317.—October Term, 1920.

The Pesaro. | Appeal from the District Court of the United States for the Southern District of New York.

[February 28, 1921.]

Mr. Justice Van Devanter delivered the opinion of the Court.

The *Pesaro*, an Italian steamship which carried a shipment of olive oil from Genoa to New York, was sued *in rem* in admiralty in the District Court to enforce a claim for damage to that part of her cargo, the libel alleging that she was "a general ship engaged in the common carriage of merchandise by water, for hire." The usual process issued and the ship was arrested. Afterwards, upon a direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and at the time of the arrest was in its possession, and therefore was not subject to the court's process, the court vacated the arrest. The libelants objected that a direct suggestion by the Ambassador was not admissible and that, to be entertained, the suggestion should come through official channels of the United States; but the objection was overruled. The libelants then requested permission to traverse the suggestion and to make a showing in opposition; but the request was denied, the court holding that to controvert or question the suggestion was not allowable. The libelants appealed directly to this court and in that connection the District Court certified the ground of its decisions as follows:

"I do certify that the vessel was released from arrest by me by a final decree herein, solely because I deemed that the United States District Court, sitting as a Court of Admiralty, has no jurisdiction to subject to its process a steamship, which is by the suggestion of the said Italian Ambassador filed in this Court represented to be the public property and in the possession of the Kingdom of Italy."